

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

APR 30 2008

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0336-PR
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MARK ANTHONY LUGO,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-35437

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED;
RELIEF GRANTED IN PART AND DENIED IN PART AND REMANDED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Mark Anthony Lugo

Florence
In Propria Persona

H O W A R D, Presiding Judge.

¶1 Petitioner Mark Anthony Lugo challenges the trial court's summary dismissal of his notice of post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., and the

trial court's denial of his subsequent motion for reconsideration. We review the court's decisions for an abuse of discretion. *See State v. Rosales*, 205 Ariz. 86, ¶ 1, 66 P.3d 1263, 1264 (App. 2003) (reviewing summary dismissal of notice of post-conviction relief for an abuse of discretion). We grant review, grant relief in part, and deny relief in part.

¶2 In June 1992, a jury found Lugo guilty of sexual conduct with a minor, attempted sexual conduct with a minor, sexual abuse, and child molestation. The trial court sentenced him to presumptive, consecutive terms of imprisonment ranging from ten years to life without the possibility of release for thirty-five years. This court affirmed the convictions on appeal but remanded the case for resentencing on two of the four counts. *State v. Lugo*, No. 2 CA-CR 92-0561 (memorandum decision filed Jan. 31, 1994). We issued our mandate in November 1994, Lugo was resentenced in August 1995, and no subsequent appeal was filed.

¶3 In March 2007, Lugo filed his first and only notice of post-conviction relief and asked the trial court to appoint counsel. The court deemed the notice untimely, noting that it had been filed years beyond the time limits provided in Rule 32.4(a). The court also determined that Lugo had failed to state sufficient facts to bring the notice within any of the exceptions to the timeliness requirement but invited Lugo to supply the missing information, stating: “[I]f [Lugo] is able to provide this Court with sufficient factual support for one of

the exceptions to the timeliness requirement, counsel will be appointed to represent [him] in a petition for post-conviction relief.”¹

¶4 Lugo alleged no additional facts. Instead, approximately four months later, he filed a motion for reconsideration in which he appeared to assert that the trial court had effectively precluded him from presenting his claims for relief by erroneously denying him counsel. Lugo’s motion was unclear at best. But, in his request for relief, he stated that he “has newly discover[ed] evidence[], documents and other information to provide to the Court in order to make a colorable claim,” but he “lack[s] the training and access to case law to argue his issues in a pleading to this court.” He asked the court, therefore, “to reconsider its decision . . . and grant him an attorney to review the newly discover[ed] evidence[] and witnesses and documents.”

¶5 The trial court denied Lugo’s motion for reconsideration, finding it, too, was untimely based on Rule 32.9(a), which allows “[a]ny party aggrieved by a final decision of the trial court” in a Rule 32 proceeding to move for rehearing “within fifteen days after the ruling.” The court also found that, “[i]n addition to being untimely,” Lugo’s motion had “fail[ed] to provide sufficient grounds on which to reverse the Court’s decision to dismiss the notice of post-conviction relief.”²

¹Rule 32.4(c)(2) requires the trial court to appoint counsel in a noncapital case “[u]pon the filing of a timely or first notice” of post-conviction relief.

²We note that the trial court’s original ruling addressing the notice of post-conviction relief did not expressly dismiss the notice. In ruling on the motion for reconsideration,

¶6 In his petition for review, Lugo does not directly address the trial court’s rulings. He states only that the court “violated his 14th Amendment Rights” by summarily dismissing his notice “because[, although he] was able to present . . . affidavits of new witnesses” and “documents” supporting an alibi defense, he “did not want to present this information to the court without an attorney doing investigation[] and legal research[] into these issues.” The remainder of Lugo’s petition for review presents issues as if they had been argued in a petition for post-conviction relief below. Because Lugo never filed a petition for post-conviction relief, however, we do not address them. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “[t]he issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”); *see also State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (issues may not properly be raised for first time in petition for review). Accordingly, we address only the trial court’s dismissal of Lugo’s notice of post-conviction relief and not the substantive issues he attempts to raise in his petition for review.

¶7 A Rule 32 “proceeding is commenced by timely filing a notice of post-conviction relief.” Ariz. R. Crim. P. 32.4(a). For a nonpleading defendant, like Lugo, convicted and sentenced in a noncapital case after September 30, 1992, the notice of post-conviction relief must be filed “within ninety days after the entry of judgment and sentence

however, the court assumed it had dismissed the notice either in its first ruling or, perhaps, upon Lugo’s failure to supply the factual foundation necessary for a claim excepted from the timeliness requirement.

or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later.” *Id.*; *see also* 171 Ariz. XLIV. The petitioner may “raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h)” in an untimely notice. Ariz. R. Crim P. 32.4(a). However, if such a claim is untimely raised, “the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in . . . a timely manner.” Ariz. R. Crim. P. 32.2(b). Further, “[i]f the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated . . . in a timely manner, the notice shall be summarily dismissed.” *Id.*

¶8 The time limits contained in Rule 32.4(a) are inapplicable, however, to a petitioner sentenced before September 30, 1992, who is filing a first notice of post-conviction relief. 171 Ariz. XLIV; *see also Moreno v. Gonzalez*, 192 Ariz. 131, ¶ 22, 962 P.2d 205, 209 (1998). In this case, Lugo originally was sentenced in July 1992. Because two of his sentences were later vacated and he was resentenced in 1995, the time limits of Rule 32.4(a) apply to those. But the time limits do not apply to Lugo’s remaining two convictions, the sentences for which we affirmed on appeal. Thus, as to those convictions, we conclude the trial court abused its discretion by dismissing Lugo’s notice on untimeliness grounds.

¶9 The trial court, however, did not abuse its discretion by dismissing the notice as to the two convictions to which the timeliness requirements apply as the result of Lugo’s resentencing in 1995. Although Lugo stated in his notice that his claims fell under the

exceptions listed in Rule 32.4(a) and 32.2(b), he failed to set forth the substance of the specific exceptions claimed, instead making only vague, unsupported, and conclusory assertions about his actual innocence, a change in the law, and the allegedly ineffective assistance of counsel. Merely listing exceptions under the rule, without more, does not satisfy its requirements. Further, Lugo failed to set forth meritorious reasons for having failed to file a timely notice. Although he claimed that he “only found out this year . . . that his attorney [had] lied to him,” he did not further explain the tardiness of his notice. A petitioner “must strictly comply with Rule 32 or be denied relief. Failure to comply with Rule 32 procedure will result in a finding that petitioner waived his right to present a Rule 32 petition.” *State v. Carriger*, 143 Ariz. 142, 146, 692 P.2d 991, 995 (1984) (internal citation omitted); *see also State v. Jones*, 182 Ariz. 432, 434, 897 P.2d 734, 736 (App. 1995) (suggesting time limits added to Rule 32.4(a) in order to “prevent *unwarranted delay*”) (emphasis added).

¶10 Accordingly, we grant review. We deny relief in part, grant relief in part, and remand this case for further proceedings consistent with this decision.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge